United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7332

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CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD. IN BANKRUPTCY PROCEEDINGS,

Plaintiff-Appellee,

vs.

CLARK-SCHWEBEL FIBER GLASS CORPORATION

and

BURLINGTON INDUSTRIES, INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of New York

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REPLY BRIEF OF DEFENDANT-APPELLANT CLARK-SCHWEBEL FIBER GLASS CORPORATION

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Plaintiff has filled the 137 pages of its answering brief with a jumble of factual and legal arguments designed to give the appearance of substance to the claims asserted in the District Court. Perhaps nowhere is this technique more transparent than in the stringing together of various citations and record references (Pl.Br. pp. 8-16) in an effort to demonstrate that Textura was something more than the thinly-capitalized, losing operation which Powrie described on the stand (see, *e.g.*, 516).* In fact, the "increase"

* References to the Appendix recite the page number without further designation. References to portions of the trial transcript not included in the Appendix are in the form "Tr. "; references to the record are in the form "R. "; and references to exhibits are in the form "PX ", or "DX ."

in sales and "profits" in early 1966 were admittedly the product of deliberate misstatement by Powrie (585-86). Plaintiff's entire case is based on nothing more substantial.

This reply will focus on the basic issues raised on this appeal, without attempting to correct every distortion contained in plaintiff's answering brief.

I.

There was no proof of a conspiracy to drive Textura out of business.

The question submitted to the jury was: "Was there a conspiracy between two or more persons or corporations to drive Textura out of business * * *?" It is the jury's affirmative answer to this question for which the record must supply support, and it does not.

To make up for the lack of proof of agreement, plaintiff discusses at length its theory of motivation (Pl.Br. pp. 21-24, 46-47). But this discussion falls woefully short of suggesting any plausible reason why Clark-Schwebel would want to drive Textura out of business. Plaintiff suggests that Clark-Schwebel's motives for wanting to drive Textura out of business were: (1) "to eliminate the favored terms negotiated by Powrie with Clark" (Pl.Br. p. 24); and (2) to give vent to its irritation with Textura's quality complaints (Pl.Br. p. 24). But neither provide plausible motivation for Clark-Schwebel to drive Textura out of business: (1) it had a clear right under its contract with Textura to "change or withdraw all terms and limits of credit" and "to withhold delivery until payment is received" (1635), which rights it exercised on March 1, 1966; and (2) it in fact took Textura's quality complaints to arbitration on June 9, 1966, again according to the contractual remedy (1635). Powrie admitted there was no evidence that either of these actions was pursuant to a conspiracy (570-71), and "no elaborate conspiracy such as plaintiff alleges was necessary" for Clark-Schwebel

to achieve the ends ascribed to it by plaintiff. See *Overseas Motor, Inc.* v. *Import Motors, Ltd.*, 1974-2 Trade Cases ¶75,242 at p. 97,613 (E.D. Mich., 1974). Clark-Schwebel's actions, including its willingness to twice modify the settlement terms with Textura (1509-12, 1814, 1815), show only a desire that Textura stay in business and pay for goods sold.

Plaintiff lists nine other matters which it argues justify the jury's verdict, the first being the background of the relations between Textura and the mills prior to March, 1966. This background gives rise to no inference in favor of plaintiff at all. Powrie testified that the highly favorable credit terms which he appreciated (516) were individually negotiated by himself with each mill separately (334-35, 336-338, 344-347); moreover, the arrangements, even on Powrie's description, were not parallel, as for example, Clark-Schwebel did not charge interest on overdue accounts nor have a personal guarantee from the Powries while Stevens and Burlington both charged interest at times and Burlington had a personal guarantee in 1965 (450, 560). Plaintiff never suggested to the jury that the fact that each of the mills "bent over backwards, with this particular account * * * to accommodate and help him" (875) somehow evidenced a conspiracy.

The early exchanges of credit information to which plaintiff refers were nothing more than occasional communications between common suppliers. Thus, for example, PX 81 (1421), dated June 2, 1965, records a conversation between Nordheim and Kelly in which Nordheim said to Kelly that: Textura owed Clark-Schwebel $31,000 (past due); that new money was coming into the business; that Nordheim had learned that Textura was also slow in paying Stevens and that Stevens charged interest which Textura paid; that one large item on the Textura balance sheet—the MoVac process—might be valuable but not as valuable as the balance sheet showed; and that he would send Burlington the April 30, 1965 financials which Clark-Schwebel had received from Textura. No restriction of credit followed this exchange of information and in fact both Burlington and

Clark-Schwebel continued to extend more and more credit during 1965.*

Plaintiff next argues that the exchanges of credit information were in fact not such but instead "vehicles for coordination of an agreed united credit policy." Plaintiff argues that if in fact credit exchanges are used for unlawful purposes, the fact that they are in form credit exchanges does not immunize them from the antitrust laws. Plaintiff's argument is upside down; the credit exchanges themselves do not prove a conspiracy; it is only when a conspiracy has been proved, that the immunity of credit exchanges used to carry out the purposes of the conspiracy vanishes (see discussion *infra*, pp. 20-21).

Plaintiff also contends that the fact that Nordheim and Schwebel, Clark-Schwebel's management, called Kelly and Janetschek of Stevens, both credit men, indicates that the calls were not routine. In fact, however, it is undisputed that Clark-Schwebel as a small company did not have a credit department (763), so there was no one to make the calls other than Schwebel and Nordheim.** On the other hand, there is absolutely no evidence of calls from Schwebel and Nordheim to management or sales personnel of Stevens or Burlington, nor any evidence that any of the communications from Schwebel and Nordheim were ever communicated by Burlington's or Stevens' credit departments to their management.

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* Similarly, PX 91 (Dec. 30, 1965) (1427) shows that Kelly and Nordheim had a conversation about Textura which occurred when Nordheim had called Kelly on another account and supplied factual information about Textura's past due payments and its relationships with Dommerich. PX 96 (Jan. 15, 1966) (1428) records a call from Nordheim to Kelly reporting that Nordheim had received payments from Textura since his last call and that he would like "to compare notes" with Donnelly, a Los Angeles credit man, when he was out there. Nothing in these exhibits, which are the only exhibits referred to by plaintiff regarding the prior history, suggests any sort of collaboration between Clark-Schwebel and Burlington beyond credit exchange permitted under the antitrust laws.

** Mr. Garvey of Burlington's credit department testified that he had frequent conversations with Schwebel on credit matters (1048).

Plaintiff also attempts to make much of an alleged suspension by Burlington of weaving on certain fabrics. Plaintiff claims that it was only after June 8, 1966, when information regarding the Clark-Schwebel-Textura dispute and the prospect of arbitration was first communicated to Kelly of Burlington's credit department, that Burlington stopped weaving "Crown" and other fabrics. As indicated above, of course, there was no evidence of any communication, either directly from Clark-Schwebel to Burlington's sales department or indirectly through Burlington's credit department to sales. The uncontradicted evidence, including Powrie's testimony and contemporaneous letters, showed that weaving was temporarily halted because of a quality dispute between Burlington and Textura and credit approval of new contracts was held up while Burlington tried to gain renewal of Powrie's personal guarantee in early 1966. A letter from Powrie to Vollers of Burlington, dated June 6, 1966 (1874), withdrew all Textura's orders for fabric until the quality problem could be resolved. After receipt of this letter, Mr. Vollers gave instructions for the mill orders to be stopped (900, 1874). Powrie was informed of this action on June 13, 1966. Almost immediately afterwards on June 22, 1966, Powrie, according to his own statement, was told that Vollers was again "turning on the tap on the above items", including "Crown" (1649, 419, 901). Shipments of the style "Crown" in June and July under the old contract were over 10,000 yards in both months (1645-48). If Burlington had stopped weaving on June 13 pursuant to conspiracy with Clark-Schwebel somehow relating to the prospective arbitration, it is hardly plausible that they would change course and "turn the tap on" on June 22 when nothing had happened with respect to the arbitration.*

* With respect to the new "Crown" contract, Powrie had been advised on May 18, 1966, that credit approval had not been granted (1867-73); this is of course weeks before Nordheim talked to Kelly. There is nothing "inexplicable" about Cann's memo of July 8 (1498) seeking clarification of the status of credit approval on this new contract; moreover, there was absolutely no evidence of any contact between Clark-Schwebel and Cann who was in Burlington's Los Angeles office.

Plaintiff also suggests that the jury could have reasonably inferred that Burlington's demands for a personal guarantee were brought about by June and July conversations with Clark-Schwebel, choosing to ignore that Burlington had had a personal guarantee in 1965 and had continuously sought its renewal from the beginning of 1966 when Textura's financial status had declined. First, the whole question of a personal guarantee is a red herring as neither the Powries nor Grafstrom gave one in 1966; no reference to these demands is made in plaintiff's discussion of proximate cause (Pl. Br. Pt. II). Moreover, the fact that Burlington in pressing its demands in June and July may have attached some importance to the fact that Clark-Schwebel had an outstanding arbitration claim of over $90,000 against Textura was, as Powrie testified, something that he expected not only of Burlington but of all his suppliers (524-25).*

A further red herring is plaintiff's argument regarding "threats" to terminate credit by Burlington, if the arbitration were not settled. The arbitration was settled at no damage to Textura—it paid only $5,000 on the $70,000 agreed to settlement figure and the Burlington credit was not terminated. Again, while plaintiff spends much of Point I of its brief discussing the alleged pressure to settle the arbitration, this subject is studiously avoided in Point II, as Textura clearly suffered no injury from it.

Moreover, the record regarding Powrie's meetings with Burlington and Stevens prior to the settlement meeting with Clark-Schwebel on July 29—taken from Powrie's own testimony—demonstrates the total inconsistency of the verdict. On July 22, 1966, Powrie received a letter from Knisel

* While plaintiff quotes Powrie's testimony that Schutz had told him that Burlington would release Powrie from the demand for guarantee if he would settle with Clark-Schwebel, plaintiff does not quote the rest of the same Powrie answer to the effect that after Powrie did advise Schutz that he had in fact settled with Clark-Schwebel, Schutz said that he still wanted the personal guarantee (443). The jury cannot base a verdict on half an answer, as plaintiff would have it (Pl. Br. p. 54).

of Stevens' credit department, demanding a personal guarantee, placing a credit ceiling of $20,000 on Textura's account and requesting a meeting as soon as possible: "We hope your plans already include a trip to New York since a personal visit is needed rather than a telephone conversation" (1504-06). Powrie testified that at that meeting Mr. Knisel said that he was putting the limit on Powrie's credit and requiring the guarantee because of the Clark-Schwebel controversy (437). In contrast, Powrie testified that he had no prior plans to see Schutz of Burlington but that he just dropped by because he was in New York to see Knisel and Clark-Schwebel. Powrie testified that during the course of the meeting Schutz said, "Well, of course, Mr. Powrie, I don't believe we can entertain a further open account with our company and yours until you settle with Clark-Schwebel" (434).

Powrie testified that because of these conversations, he felt under pressure when he went to meet with Schwebel and Nordheim on July 29 and therefore agreed to settle, but he also testified that he had come to New York for the purpose of settling with Clark-Schwebel (431). On the basis of the record, the pressure supposedly exerted by Stevens was far greater than that exerted by Burlington. If these circumstances are relied upon to provide support for the jury's verdict—and the amount of space devoted to them in plaintiff's brief indicate that they constitute its principal reliance—then the issue of inconsistent verdicts must be squarely faced. The justifications for alleged inconsistency quoted (Pl. Br. p. 66) from *Fox West Coast Theatres Corp.* v. *Paradise Theatres Corp.*, 264 F. 2d 602, 605 (9th Cir. 1958)—that a conspirator might be cleared "for lack of knowledge of the scheme or unlawful design or because they were coerced"—are just not present with respect to Stevens. There is no rational basis on this record for finding that Burlington had coerced Textura into settling its dispute with Clark-Schwebel and not finding that Stevens had also done so.

There is no record support for the claim that Burlington's actions with respect to weaving the Clark-Schwebel

fabric "Morro" were taken pursuant to a conspiracy or caused any harm to Textura. In fact, Burlington did weave a sample run on that style, and Powrie testified that he had a conversation with Vollers which was noncommittal as to whether Burlington would be able to weave that fabric or not (425). Powrie said, however, that subsequently he had lost interest in it and "it kind of faded out of the picture" (427). The jury verdict for $531,617 can hardly be based on Burlington's allegedly noncommittal response to Powrie's request to weave a fabric in which he then lost interest, and for which no order was ever submitted.

Textura now also claims that the jury could have inferred some sort of conspiracy because of Burlington's claimed neglect of quality problems. But Powrie volunteered on the stand—he was asked only about Stevens' adjustments—that he always got satisfactory quality adjustments from Burlington (520), and there is absolutely no evidence of any contact or influence of Clark-Schwebel with those in Burlington responsible for quality adjustments.*

Textura continues to argue in the face of no evidence that Kelly must have been alerted to Clark-Schwebel's claims against Textura prior to the June 8, 1966 telephone call from Nordheim of Clark-Schwebel to Kelly of Burlington recorded in a memorandum of that date (1488).** This memorandum, offered in evidence by plaintiff itself,

* Plaintiff claims, without record reference, that there was a "spirit of compromise" about quality disputes present at a June 2 meeting between Powrie and Burlington but that this faded after the June 8 communication of Nordheim to Kelly. Yet the June 6 letter signed by Powrie himself, stating that no conclusion had been reached about the quality problem, and that in light of that Powrie was not going to place any orders for new styles, hardly evidences any such spirit. In fact, Burlington as late as November 29, 1966 agreed to take back substantial amounts of yardage shipped on two contracts that Powrie claimed were unusable (1809-10), and Powrie testified that this was satisfactory (511-12, 1534-36).

** It was the testimony of the head of Burlington's Credit Department, Garvey, that memos to the file were regularly prepared on or about the time events, such as calls, took place (Tr. 2057-58).

's totally inconsiste[illegible]'th plaintiff's present assumption hat Burlington knew of these actions prior to June 8, 1966. Moreover, sev[illegible]al other internal Burlington credit memoranda, dated afte[illegible] March 1, 1966 but before June 8, 1966 (as well as a memorandum written on June 8 by Mr. Schutz, 1889-90), discussed the Textura account in detail but made no reference whatever to Clark-Schwebel's March 1, 1966 action. (*E.g.*, 1884, 1885, 1886, 1401, DX BG). Nor is there any testimony—of Powrie or anyone else—placing Burlington's knowledge of these actions earlier than June 8, 1966. All Powrie had told Burlington was that Textura had a claim against Clark-Schwebel in connection with the Civic Center job in Chic[illegible]o and that Nordheim was "giving him a run around." [illegible]4).

Finally—and again this is a new theory, not argued to the jury—plaintiff contends that after July 29 Burlington undertook to "orchestrate" with Clark-Schwebel to enforce payments by Textura under the settlement ag[illegible]ement. Of course, the end result of any such orchestration was minimal since Clark-Schwebel received only $5,000 on the settlement.

No evidence to support this new contention appears on the record. Burlington's interest in the settlement was knowing whether Textura was going to be able to pay the settlement, to keep alive, and to keep paying both past due bills and for the new Burlington goods it ordered. Thus, Powrie asked Nordheim to call Burlington and confirm that a modification of the settlement terms had been reached, which Nordheim did (1537). When Textura defaulted on the first payment under the modification, it was incumbent for Nordheim to inform Burlington (1522). The Burlington credit memo recording this simply reflects Burlington's effort to double check the information received from Nordheim.

In referring to legal authorities plaintiff does not discuss the recent Second Circuit case discussing the issues of

proof of conspiracy and independent business judgment (*Modern Home Institute Inc.* v. *Hartford Accident and Indemnity Co.*, 1975-1 Trade Cases ¶60,216 (2d Cir. 1975)), nor does plaintiff refer to the even more recent Third Circuit case of *Venzie Corp.* v. *U.S. Mineral Products Co.*, 1975-2 Trade Cases ¶60,481 (3rd Cir. 1975). In that case a jury verdict for plaintiffs was set aside by the trial court and judgment for defendants was affirmed on appeal. The case involved the refusals of a manufacturer of fireproofing materials and its licensed applicator to sell a product to other applicators. The court concluded that a jury could not have reasonably found that parallel refusals to deal constituted an illegal conspiracy, even where there was proof that the defendants had had conversations regarding plaintiff during the relevant period. The court said that plaintiff's evidence did not include two elements "generally considered critical in establishing conspiracy from evidence of parallel business behavior": (1) a showing of acts by defendants in contradiction of their own economic interests and (2) a satisfactory demonstration of a motivation to enter an agreement. With respect to the question of motivation, the Court said:

> "in the absence of a demonstration of how it would benefit a party to refuse to deal, the requisite inference of conspiracy does not follow from a mere coincidence of refusals to deal." (*Id.* at pp. 67, 136, citing *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 287 (1968).)

The Court held that since plaintiffs had failed to prove any conduct contrary to defendant's economic interest and did not point to any factors which would have provided plausible motivation for a conspiracy, there was insufficient evidence "to permit the jury to reject the conclusion that [defendant's] refusals of plaintiff's offers to purchase were the result of independent business judgment exercised consistently with its economic interests." *Id.* at 67, 137.

Plaintiff confines its legal analysis largely to quoting dicta from numerous cases which resulted in judgments for

defendants.* Suffice it to say that none of the cases quoted in any way conflict with *Modern Home* or *Venzie*.

While plaintiff refers to this as a "classic" conspiracy case, it makes no effort to refute appellants' demonstration that except for credit exchange and highly attenuated proof of "similar" behavior, no other evidence of conspiracy was adduced. Plaintiff's quotation of the District Court to the effect that there was such other evidence does not make up for the deficiencies in the record, no more than plaintiff's quotation of the District Court that the actions taken were in "apparent contradiction" to defendants' self-interest, make up for plaintiff's (and the District Court's) failure to analyze or support that proposition.

II.

There was no evidence that a conspiracy between defendants was the proximate cause for Textura going out of business.

Again, to return to the question posed to the jury, were defendants' acts the proximate cause of Textura going out of business? It would not be sufficient, as plaintiff from time to time suggests in its brief, to find that defendants' acts caused "some injury" to plaintiff (Pl. Br. p. 69); rather, in the language of the Supreme Court quoted by plaintiff, it must be shown that the illegality was a "material cause" of Textura having gone out of business. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 114, n.9 (1969).

In this light, much of Point I of plaintiff's brief falls by the wayside when the issue of proximate cause is con-

* *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537 (1954); *Delaware Valley Marine Sup. Co.* v. *American Tobacco Co.*, 297 F. 2d 199 (3rd Cir. 1961), *cert. denied* 369 U.S. 839 (1962); *Standard Oil Company of California* v. *Moore*, 251 F. 2d 188 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958); *Flintkote Company* v. *Lysfjord*, 246 F. 2d 368 (9th Cir. 1957), *cert. denied* 355 U.S. 835 (1957); *Pacific Tobacco Corp.* v. *American Tobacco Co.*, 1974-1 Trade Cases ¶74,991 (D. Ore. 1974).

sidered. Even if there were sufficient evidence to get to the jury on the question of whether defendants agreed to obtain personal guarantees from the Powries, no such guarantees were ever given and certainly did not contribute to Textura's going out of business. The same is true of Burlington's alleged failure to weave Morro, the fabric in which Powrie lost interest, and of the alleged pressure applied by Burlington to force Textura to enter into or make payments on a settlement agreement, which resulted in its payment of $5,000 on an admitted $70,000 obligation.

Much of plaintiff's attention in Point II is directed to the alleged harm suffered by Textura resulting from the withdrawal of the "extended terms of credit." In the course of plaintiff's argument, such terms seem to rise to the level of a vested right. They of course were no such thing. The contracts between the parties always remained in effect and each defendant had the right to invoke the 30 or 60 day credit terms provided for therein (see Clark-Schwebel Brief (hereafter "C-S Br."), p. 16, note). The fact that Textura might not have been able to remain in business without extended terms does not mean that defendants were obligated to extend them; surely defendants were not obligated to maintain Powrie in the glass fabrics business on such terms as he from time to time might desire, irrespective of the financial risk to themselves.

With respect to the alleged withdrawal of extended terms of credit by Clark-Schwebel and Clark-Schwebel's refusal to ship fabric to Textura on a credit basis, these actions stem directly from the March 1, 1966 decision of Clark-Schwebel as to which there is not one iota of proof of prior discussion or agreement with Burlington, and indeed both actions were specifically permitted by the contract between the parties.

Plaintiff also contends that there were no other sources of supply except Clark-Schwebel and Burlington, and that it could not even buy the goods needed for the "contract" business from Stevens. This argument is flatly contra-

dicted by Powrie's own statements on the record, such as "We bought merchandise from lots of people. It may not have been from the defendants at all." (580-81; see also *e.g.*, 486-87; Tr. 536, 537). It is further clear that Textura had for more than ten years purchased a substantial volume of fabrics from J. P. Stevens and that it was able to obtain extended credit terms from Stevens because it used their fabrics in the contract business.* United Merchants and Manufacturers was another admittedly substantial weaver of decorative fiberglass fabrics (Tr. 128-29) and a potential source of supply which was much larger than Clark-Schwebel; indeed Clark-Schwebel was not even a factor in the decorative fabric industry (906), and Powrie claimed it "didn't have anything to sell" in any event Tr. 659).

Plaintiff contends that Textura's financial statements do not show that Textura had large and growing inventories of fabric. But the very figures it quotes (Pl. Br. p. 80, n.) show the purchase of more inventory than was used in July, August, September and October, 1966, the very months in which plaintiff claims it suffered the most damage. The income statements identify the inventory item as "Purchases, Piece Goods, Finishing and Printing" (*e.g.*, 1377-79). Asked about these very figures, Powrie testified that those purchases of inventory were made on credit from Stevens and Burlington (Tr. 2154-55).

Plaintiff does not respond to the fact that Dommerich's building up of large cash reserves in Textura's account during July and August, 1966, meant that, in Powrie's

* Powrie testified that when he asked Stevens for extended credit terms he told Stevens this was because of "the differences between our company and its operation, and his other customers." "We were entering into a new business which would delay payments from our customers to us, and, hopefully, we could pass that problem on or it would be shared with Stevens by Glass Fabrics. For those reasons we needed terms far beyond the net 30 which showed on the contracts * * *" (335).

words, "we didn't have cash to operate with." (466-67). It was this, and Textura's inability to generate sales, which were the material causes of Textura going out of business.

III.

Plaintiff's proof of damages was entirely inadequate.

Plaintiff's proof of damages was utterly inadequate. We shall examine the unusual collection of documents which plaintiff claims "establish the amount of lost profits." (Br. p. 85, n.).

A. The Expert Projections

The principal damage arguments of plaintiff below were the projections of Drs. Bruner and Mosich, the fundamental inadequacy of which has been discussed in detail in Burlington's opening brief. We submit that these projections were so unwarranted and so outlandish that they should not have been received in evidence at all, much less used to justify this jury's verdict. The end result of the projections were three possible damage figures offered by Dr. Mosich: (1) $56,615,799; (2) based on a slower growth rate, $48,503,471; and (3) with Dr. Mosich taking what he characterized as an effort "to be conservative, to take as cautious an approach as I could based on the information that I had before me" (837), $13,531,518. This was all for an enterprise which had lost $113,788 and $31,195 in the previous two years of its operation, before the alleged conspiracy commenced.

In any event, these were the only figures discussed by plaintiff's experts, and hardly supply a rational justification for this jury's damage figure. Dr. Mosich's "conservative" and "cautious" projection of $13,531,518 is almost precisely $13,000,000 more than the jury's finding of $531,617; there was no way to get from one figure to the other. As the Court said in *Joseph E. Seagram & Sons, Inc.* v.

Hawaiian Oke and Liquors, Ltd., 416 F. 2d 71, 87 (9th Cir., 1969), *cert. denied* 396 U.S. 1062 (1970):

> "We are fully aware that 'the plaintiff is not required to prove with mathematical certainty the amount of its damage resulting from a defendant's violation of the antitrust laws.' [Citation omitted.] But this does not mean that the door is opened to present to a jury the kind of rampant speculation that went to the jury in this case."

B. The Financial Statements

Plaintiff seeks to justify the jury award also on the basis of the internal financial statements of Textura for 1966 (1356-61, 1368-79), and the June, 1966 pencil draft statement (1387-91).*

To show Textura's supposedly increasing sales in 1966, plaintiff refers to the January-May monthly sales, which reflect sales for each of those five months in the area of $150,000 (Pl. Br. p. 40). Curiously enough, plaintiff does not include in that summary the June and July figures (1374-76, 1377-79) although Powrie testified on the stand that June and July had been "excellent" months in which business had been "terrific." (Tr. 798).

It is not surprising that the first five months of 1966, as well as the June statement, show sales of around $150,000 for the month, because as Textura's bookkeeper testified, she was directed by Powrie to keep the books open every month until sales reached $150,000 (919-20). As Powrie testified:

> "Q. Now you in fact directed Miss Sharpe to include in the June sales invoices that were dated in July, did you not?"
>
> A. Yes, and that's true of all these statements." (Tr. 804).

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* The June, 1966 statement also served as the basis for Dr. Mosich's profit projections discussed above.

In contrast, however, expenses were closed at the end of the month (921), meaning that both sales and profits for each month were distorted, and that these statements were totally unreliable.*

The June internal statement (1374-76) is an egregious example of this unreliability. It shows sales in June of $128,000 (Tr. 802), but not only are there included within that statement $15,000 of July sales but also a totally improperly recorded $66,000 sale (Tr. 805). Thus, in fact, the sales in June, instead of $128,000 were $47,000 (Tr. 802-805; Tr. 1106). Yet this is the month which Powrie represented both to his suppliers and on the witness stand had been "terrific" (Tr. 798).

The handwritten pencil draft of Textura's outside auditors (1387-91) is no more competent proof of plaintiff's damages. Introduced into evidence over defendants' objections, that statement was never typed, signed or issued by the accountants, and except for the elimination of the one $66,000 sale mentioned above, it copies the improper sales included in the June internal statement, the unreliability of which has been demonstrated above. The testimony of Zimmerman at the trial cannot save the statement, as he had been removed from the Textura account prior to the time the statement was prepared and did not examine Textura's books and records contemporaneously with its preparation (743). To the extent that Zimmerman attempted to justify the statement by virtue of his examination of books eight years after the events in preparation for his testimony, such justification is no better than that offered for the unaudited statement involved in *Knutson* v. *Daily Review, Inc.*, 383 F. Supp. 1346 (N.D. Cal. 1974), prepared after the commencement of the litigation. Like the statement involved in *Knutson*, PX 47 (1387-91) was based on unverified and improper management representa-

* Plaintiff's own expert accounting witness testified that this would be an improper accounting practice (Tr. 1332-33).

tions. Dr. Mosich's testimony with reference to this statement is no stronger in that he also never went behind the statement into the books and records (Tr. 1329).*

C. The Friedman Projections

Plaintiff also relies on the deposition testimony of Textura's general manager in 1965, Friedman, and on projections (1392-93) prepared by him, apparently in 1965 (949-50). These projections are desigend to show what Textura's profits might be if certain sales levels were reached. Friedman testified that the profit projections were also based on his estimates of cutting costs and that if the cost cuttings were not successful, then the break-even figures projected would not hold (963). The aggregate expenses for the first six months of 1966, as shown by Textura's records, were $256,996 (1387-91), or a monthly average expense figure of $42,832. Friedman's projections would not show a profit at this expense level until Textura reached a monthly sales level of approximately $200,000 a month (1393). Textura never reached such a monthly sales level, even in Powrie's wildest imagination. Friedmans projection cannot be considered competent evidence of damage; all it does, in conjunction with Textura's own records, is confirm continuing losses.

D. Textura's "Lost Contracts", etc.

Finally, plaintiff relies on a motley assortment of unverified internal documents. Even if these documents were competent, all they demonstrate was that Textura would not have a sales volume, over a period of months, which would, in light of Textura's expenses, be sufficient to bring it to a break-even position.

The first group of documents in this category are supposed "unfilled purchase orders or invoices of Textura in

* Plaintiff seeks to justify the 1966 statement as representative by arguing in the space of one paragraph that "no truly representative period from which profits could be projected existed", but that "the first six months of 1966 was not an unrepresentative period in Textura's history" (Pl. Br. p. 107).

1966" (1652, 1653-98). Actually the documents are internal Textura records labeled "Invoice"; there are no purchase orders showing that in fact the document reflects an order from an outside company. The trial court received these documents "subject to connection" (481), but no connection was ever offered. Their total volume is $12,000.

Next are two exhibits constituting supposed "potential contracts or 'working' jobs of Textura in 1966": (1) PX 254 (1529-31), a letter written by a former Textura representative to Powrie (written in August, 1970, four years after this suit was started) which describes "some large jobs that we were working on while we were still acting for Textura, Ltd."; and (2) PX 855 (1712), a list of jobs dated January 3, 1967, prepared by a former employee of Textura which that employee supposedly handed to Powrie "saying that he was going to complete these jobs independent of Textura" (Tr. 579). That is the sum and substance of the testimony explaining these exhibits.

There are, in addition, "job status reports" of Textura (1570, 1707, 1710-11), which supposedly reflect Textura's progress in obtaining contracts. To take DX 628 (1570) as an example, there is no way of determining from this report whether the listing of names reflects contracts which have actually been signed or jobs where fabric was specified. Powrie's testimony with respect to these exhibits did not identify any firm contracts (Tr. 574-75). Projected delivery dates are in both 1967 and 1968. Further, it must be recalled that at the time these exhibits were prepared, Fenestra Fabrics, Textura's contracting arm, was a separate entity, owned by Powrie and Grafstrom (491), so that in the absence of some showing that these records reflected Textura contracts—as distinguished from Fenestra contracts—they are totally incompetent in any event.

Finally, plaintiff claims that damages could be based on unfinished contracts of Textura, a claim which the trial judge called "very tenuous" (485). Analysis of the contracts involved bears out this comment, for at least two

of the contracts (1564-65, 1566-67) involved fabrics other than those supplied by defendants; four (1566-67, 1651, 1568-69, 1706) were contracts of third parties with Fenestra, now owned by Powrie and Grafstrom individually, not by Textura (491), and the last (1699-1703) was completed by Textura's representative with Clark-Schwebel fabric (487, 490).

We submit that neither plaintiff's internal records nor the grandiose speculation of its experts justify the jury's award of damages.

IV.

Errors in the charge to the jury and conduct of the case require reversal and a new trial.

A. The Errors in the Charge

Plaintiff's principal authority with respect to the standards to be applied to jury charges, *Franks* v. *United States Lines Co.*, 324 F. 2d 126 (2d Cir. 1963), teaches that "a single ruling can vitiate an entire charge if it is on a vital issue and is misleading", 324 F. 2d at 127. And it is well established that an erroneous statement of the law as to a specific vital issue cannot be cured by a prior abstract charge. *DeLima* v. *Trinidad Corp.*, 302 F. 2d 585, 587 (2d Cir. 1962); *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946).

Certainly the four fundamental errors described in our opening brief (pp. 36-40)* related to such "vital" issues. Plaintiff's conspiracy case admittedly rested solely on circumstantial evidence, arguing that inferences were to be drawn from the fact that defendants were allegedly in "constant contact" (exchange of credit information) and supposedly took similar restrictive credit measures toward Textura after March, 1966 contrary to their independent self-interest. A misleading or incorrect charge on these

* The charges regarding independent self-interest and exchange of information; the failure to distinguish the two claimed conspiracies and references to "one conspiracy" and "the conspiracy"; and the charge regarding co-conspirators.

issues would make a proper resolution of the case by the jury impossible.

With respect to the issues of parallel conduct and independent self-interest, defendants requested a charge to the effect that similar or parallel conduct would not alone establish the existence of a conspiracy and that *no* inference of conspiracy could be drawn where the actions of defendants were consistent with their own independent self-interest. (C-S Br., App. B, pp. 3a-4a). Plaintiff's response to this is (1) that the charge in effect was given (Pl. Br. p. 119), although manifestly it was not, and (2) the charge does not reflect the law (Pl. Br. p. 121), which it does.

The charge as given (1196) allowed defendants' claim of independent self-interest to be viewed by the jury only as "tending to refute the inference that there was a conspiracy." This view of the conscious parallelism doctrine—that parallel or similar conduct raises an inference of conspiracy and evidence that the actions reflect independent business judgment only tends to refute the inference—is contrary to the law of this circuit as established in *Modern Home Institute, Inc.* v. *Hartford Accident & Indem. Co.*, 1975-1 Trade Cases ¶60,216 (2d Cir. 1975). It is contrary also to *Venzie Corp.* v. *U.S. Mineral Products Co.*, 1975-2 Trade Cases, ¶60,481 (3rd Cir. 1975), which holds that the burden is on plaintiff to prove both plausible motivation and that defendants' acts were contrary to their economic interests, before a conspiracy can be found. See, also, *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F. 2d 71, 84-85 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970) and the cases cited at pp. 37-40 of the Burlington Brief. The Court's instruction on this vital issue was incorrect, misleading to the jury, and highly prejudicial.

The Court in its charge also permitted the jury to consider the credit information exchange as evidence in determining whether a conspiracy existed (1195). This is contrary to the principal case cited by plaintiff. In *Fox*

West Coast Theatres Corp. v. *Paradise Theatre Building Corp.*, 264 F. 2d 602 (9th Cir. 1958), the Ninth Circuit stated:

> "The trial court told the jury that *no inference of conspiracy was to be drawn* from the doing of these acts." (Emphasis added.) *Id.* at 606.

This is the instruction (*i.e.*, credit exchange *does not* violate the antitrust law) defendants requested and were denied (C-S Br., App. B, p. 6a). In the *Fox* case, the Ninth Circuit went on to say that these acts could only be considered once a conspiracy was found (*id.*), not as here as evidence to show a conspiracy.

Nor did the trial court instruct the jury, as plaintiff would now have it (Pl. Br. p. 121), that the jury could consider the exchange of credit information as evidence of conspiracy only if they found it was more than a mere credit exchange. The court gave no such cautionary charge, and by failing so to do totally discarded the protections given to legitimate credit exchange by the Supreme Court in *Swift & Co.* v. *United States*, 196 U.S. 375 (1905), and *Cement Mfrs. Protective Ass'n.* v. *United States*, 268 U.S. 588 (1925).

As to the other errors in the charge, plaintiff contends that the jury verdict was not affected by them—that is, for example, that the jury must have found that Burlington and Clark-Schwebel conspired with each other despite the admittedly (by the court) erroneous charge suggesting that the jury could consider evidence regarding co-conspirators. Surely the courts cannot be satisfied with the winning party's Pollyannish view of the deliberations; what counsel for either side can never know is whether the jury considered any of the testimony regarding Dommerich or Soft-Flex in coming to its conclusion,* or what importance was put on the admitted industrial conspiracy in finding that there was a conspiracy to drive Textura out of business.

* We note that the jury's initial questions to the Court during deliberations referred to several of the alleged co-conspirators and sought details about Soft-Flex and its organization (1251).

B. The Prejudicial Atmosphere of the Trial

Plaintiff attempts to justify its constant references to industrial price-fixing at the trial as part of its attempt to prove decorative price-fixing. But indeed this constituted *all* of its case on that subject—despite eight years of preparation, plaintiff did not adduce one document or one chart showing price comparisons which would lend any credibility to its claim. This is clearly set forth in the ruling of the trial court excluding conversations supposedly containing admissions of Clark-Schaebel's deceased chief executive (Tr. 1422-23). Referring to the decorative price-fixing case as "a phantom case", the court remarked:

> "The Court: This case is being tried backwards. We don't have a single jot of evidence about prices charged for decorative fabrics, comparison between prices, anything on which you could base the existence of a conspiracy. The entire tactic here seems to introduce what could well be inadmissible and prejudicial testimony with the idea that this could be cured later on."
>
> * * *
>
> "The Court: There is proof of a conspiracy to fix industrial prices, but that is not evidence of fixing prices of decorative fabrics. There is no similarity between the products, * * *." (Tr., p. 1422)*

The fact that there was "no similarity between the products" is also borne out by the Information (PX 866) which specifically excluded decorative fabrics from its ambit (¶1). This fact effectively distinguishes *Milgram* v. *Loew's Inc.*, 192 F. 2d 579 (3rd Cir. 1951), *cert. denied* 343 U.S. 929 (1952), which limited evidence of past proclivity to situations where the conspiracy to be proved was "identical in scope and nature" with the prior conspiracy. Moreover, when all the evidence was in, and decorative price-fixing had been ruled out of the case, plaintiff was not deterred from

* It is on the basis of these considerations, not the Dead-Man's Statute, that the evidence—whatever it might have been—was excluded. (Compare Pl. Br. p. 128, n.)

making industrial price-fixing a major part of its summation (1108, 1110, 1124-26).

Plaintiff's excessive preoccupation with the price-fixing issues in the presence of the jury is only one aspect of what amounted to a highly prejudicial trial atmosphere, an atmosphere which must be viewed *in toto*. Thus, the Court's erroneous charges must be considered together with the absence of the trial judge at the climax of the case, the confusion evidenced by the jury, the unexpected limitation of the summation of the two appellants, and the prejudicial atmosphere engendered by the price-fixing issues.

With respect to the limitation of summation, plaintiff does little more than set forth an argumentative statement of facts, and assert that defendants' position constitutes an unwarranted personal attack on the judge (Pl. Br. p. 6). To the contrary, the record is clear that the trial judge's absence and haste to "get through" (1061) at the end of the trial resulted not only in an unexpected and improper limitation of summation of counsel for appellants after a four-week trial, but resulted also in an admittedly erroneous charge which contained statements directly contrary to rulings of the court before its personal emergency arose. This meant not only that appellants were deprived of their right to explain their case to the jury,* but also that the jury itself was deprived of clear guidance on the law, leading to its several expressions of confusion. (See C-S Br. pp. 37, 38, 48-50; 1135-39).

* Plaintiff claims that appellants should have made more use of the "two minutes" and the "five minutes" given them by the court. But neither time period could have permitted the coherent presentation that fairness requires. Clark-Schwebel's counsel had, after ten minutes, only covered the background of the conspiracy up to March 1, 1966 when he was unexpectedly ordered to complete his remarks in two minutes (1089).

Moreover, the fact that the trial judge relented on his determination to charge the jury after plaintiff's counsel finished his two-hour summation after 5:00 o'clock (see Pl. Br. p. 134), does not gainsay the judge's earlier determination to finish that afternoon (1064).

All of the issues which bear on the appropriateness of a new trial must be viewed in light of the circumstantial nature of plaintiff's evidence of conspiracy, the totally tenuous showing of proximate cause and the outlandish presentation as to damages by plaintiff's expert witnesses. When considered as a whole, the conclusion that defendants should be granted a new trial is inescapable.

Conclusion

The judgment below should be reversed and a judgment for the defendants entered as a matter of law, or, in the alternative, a new trial should be granted.

Dated: New York, New York
November 14, 1975

Respectfully submitted,

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